19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO. 651,069 **SECTION 22**

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.

VERSUS

CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED,
BEAM PARTNERS, LLC, MILLIMAN, INC., BUCK CONSULTANTS, LLC., WARNER L.
THOMAS, IV, WILLIAM A. OLIVER, SCOTT POSECAI, PAT QUIINLAN, PETER NOVEMBER, MICHAEL HULEFEED, ALLIED WORLD SPECIALTY INSURANCE COMPANY a/k/a DARWIN NATIONAL ASSURANCE COMPANY, ATLANTIC SPECIALTY INSURANCE COMPANY, EVANSTON INSURANCE COMPANY, RSUI INDEMNITY COMPANY AND ZURICH AMERICAN INSURANCE COMPANY

FILED:_______________________ _______________________
DEPUTY CLERK

ATLANTIC SPECIALTY INSURANCE COMPANY'S OPPOSITION MEMORANDUM IN RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING "REGULATOR" FAULT OR "RECEIVER FAULT" DEFENSES OR, IN THE ALTERNATIVE, MOTION TO STRIKE DEFENSES PRECLUDED AS A MATTER OF LAW

Defendant, Atlantic World Specialty Insurance Company ("Atlantic Specialty"), respectfully submits this Opposition Memorandum in Response to Plaintiff's Motion for Partial Summary Judgment Regarding "Regulator" Fault or "Receiver Fault" Defenses, or, in the Alternative, Motion to Strike Defenses Precluded as a Matter of Law (hereinafter "Motion"). As discussed below, Plaintiff's Motion should be denied.

STATEMENT IN RESPONSE TO PLAINTIFF'S LIST OF ESSENTIAL UNDISPUTED MATERIAL FACTS

1. Statement No. 1 in Plaintiff's List of Essential Undisputed Material Facts is not directed at Atlantic, and therefore no response is required. To the extent a response is required, Atlantic disputes the statement except to admit that the Answer of Milliman, Inc. ("Milliman") is a written document and, as such, the best evidence of its contents and speaks for itself. Any portion of the statement that tends to expand, modify or vary the terms of the Answer are expressly disputed.

2. Statement No. 2 in Plaintiff's List of Essential Undisputed Material Facts is not directed at Atlantic, and therefore no response is required. To the extent a response is required, Atlantic disputes the statement except to admit that the Answer of Buck Consultants, LLC n/k/a Buck Global, LLC ("Buck") is a written document and, as such, the best evidence of its contents and speaks for itself. Any portion of the statement that tends to expand, modify or vary the terms of the Answer are expressly disputed.

3. Statement No. 3 in Plaintiff's List of Essential Undisputed Material Facts is not directed at Atlantic, and therefore no response is required. To the extent a response is required, Atlantic disputes the statement except to admit that the Answer of Group Resources Incorporated ("GRI") is a written document and, as such, the best evidence of its contents and speaks for itself. Any portion of the statement that tends to expand, modify or vary the terms of the Answer are expressly disputed.

4. Statement No. 4 in Plaintiff's List of Essential Undisputed Material Facts is not directed at Atlantic, and therefore no response is required. To the extent a response is required, Atlantic disputes the statement except to admit that the Answer of RSUI Indemnity Company ("RSUI") is a written document and, as such, the best evidence of its contents and speaks for itself. Any portion of the statement that tends to expand, modify or vary the terms of the Answer are expressly disputed.

5. Statement No. 5 in Plaintiff's List of Essential Undisputed Material Facts is not directed at Atlantic, and therefore no response is required. To the extent a response is required, Atlantic disputes the statement except to admit that the Answer of Evanston Insurance Company ("Evanston") is a written document and, as such, the best evidence of its contents and speaks for itself. Any portion of the statement that tends to expand, modify or vary the terms of the Answer are expressly disputed.

6. Atlantic disputes Statement No. 6 in Plaintiff's List of Essential Undisputed Material Facts except to admit that Atlantic's Answer is a written document and, as such, the best evidence of its contents and speaks for itself. Any portion of the statement that tends to expand, modify or vary the terms of the Answer are expressly disputed.

7. Statement No. 7 in Plaintiff's List of Essential Undisputed Material Facts is not directed at Atlantic, and therefore no response is required. To the extent a response is required, Atlantic disputes the statement except to admit that the Answer of Zurich American Insurance Company

("Zurich") is a written document and, as such, the best evidence of its contents and speaks for itself. Any portion of the statement that tends to expand, modify or vary the terms of the Answer are expressly disputed.

8. Statement No. 8 in Plaintiff's List of Essential Undisputed Material Facts is not directed at Atlantic, and therefore no response is required. To the extent a response is required, Atlantic disputes the statement except to admit that the Answer of Allied World Specialty Insurance Company (f/k/a Darwin National Assurance Company) ("Allied World") is a written document and, as such, the best evidence of its contents and speaks for itself. Any portion of the statement that tends to expand, modify or vary the terms of the Answer are expressly disputed.

STANDARD FOR SUMMARY JUDGMENT

Pursuant to La. C.C.P. art. 966, "after adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the move is entitled to judgment as a matter of law shall be granted."[1] Granting a motion for summary judgment is proper—after an opportunity for adequate discovery— only if:

> [T]he motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. The mover of the motion bears the burden of proof; however, if the mover will not bear the burden of proof at trial, the moving party must only point out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the burden shifts to the non-moving party to produce factual support to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the non-moving party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law.[2]

Louisiana law recognizes that:

> A material fact is one that potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. . . . Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case.[3]

In "determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence."[4] And, "[d]espite the legislative mandate

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[1] La. C.C.P. art. 966(C)(1).

[2] *Ronald's Lawn Serv., LLC v. St. John the Baptist Par. Sch. Bd.*, 19-244 (La. App. 5 Cir. 12/11/19), 284 So. 3d 696, 700, *reh'g denied* (Jan. 3, 2020) (internal citations omitted); La. Code of Civ. Proc. Art. 966(D)(1).

[3] *Nugent v. On-Call Nursing Agency & Assoc. of New Orleans, Inc.*, 07-1022, *5 (La. App. 5 Cir., 3/25/08), 983 So.2d 128, 132.

[4] *Cenance v. Tassin*, 2003-1379, *3 (La. App. 4 Cir. 3/3/04), 869 So. 2d 913, 916.

that summary judgments are now favored, **factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion and all doubts must be resolved in the opponent's favor.**"[5] Thus, the party defending "against the motion for summary judgment must have his properly filed allegations taken as true and must receive the benefit of the doubt when his assertions conflict with those of the movant."[6]

STANDARD FOR MOTION TO STRIKE

Louisiana Code of Civil Procedure Article 964 provides that "The court on motion of a party or on its own motion may at any time and after a hearing order stricken from any pleading any insufficient demand or defense or any redundant, immaterial, impertinent, or scandalous matter." The granting of a motion to strike pursuant to Article 964 rests in the sound discretion of the trial court.[7] Motions to strike are viewed with disfavor and are infrequently granted.[8] "They are disfavored because striking a portion of a pleading is a drastic remedy, and because they are often sought by the movant simply as a dilatory tactic."[9] A motion to strike is proper if it can be shown that the allegations being challenged are so unrelated to a plaintiff's claims as to be unworthy of any consideration and that their presence in the pleading would be prejudicial to the moving party.[10] A motion to strike is a means of clearing up the pleadings, not a means of eliminating causes of action or substantive allegations.[11]

LAW AND ARGUMENT

I. ADOPTION OF ALL OTHER BRIEFS/ARGUMENTS IN RESPONSE TO PLAINTIFF'S MOTION

To the extent not otherwise inconsistent with its defenses, Atlantic hereby adopts as if incorporated herein *in extenso* the Oppositions and arguments therein filed or to be filed by any of the defendants in this matter – including but not limited to Milliman, Buck, GRI, Allied World, Evanston, RSUI, and/or Zurich – in response to Plaintiff's Motion.

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[5] *Cenance*, 869 So. 2d at 916 (citing *Willis v. Medders*, 00-2507, *1 (La. 12/08/00), 775 So.2d 1049, 1050) (emphasis added).

[6] *Union Oil Co. of California v. Cheyenne Oil Properties, Inc.*, 2002-1330, *7 (La. App. 3 Cir. 3/5/03), 839 So. 2d 1170, 1175.

[7] *Cole v. Cole*, (La. App 1 Cir. 9/21/18), 264 So. 3d 537.

[8] *Id.*

[9] *Id.*

[10] *Carr v. Abel*, 2010-835 (La. App. 5 Cir. 3/29/11), 64 So. 3d 292, 296, *writ denied*, 2011-0860 (La. 6/3/11), 63 So. 3d 1016. *See also Smith v. Gautreau*, 348 So. 2d 720, 722 (La. App. 1 Cir. 1977).

[11] *Hicks v. Steve R. Reich, Inc.*, 38,424 (La. App. 2 Cir. 5/12/04), 873 So. 2d 849, 852; *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 2001-0345 (La. App. 3 Cir. 6/20/01), 790 So. 2d 93, 98.

II. PLAINTIFF'S MOTION TO STRIKE IS PROCEDURALLY IMPROPER

A motion to strike is proper if it can be shown that (1) the allegations being challenged are so unrelated to a plaintiff's claims as to be unworthy of any consideration and (2) that their presence in the pleading would be prejudicial to the moving party.[12] A motion to strike is a means of clearing up the pleadings, ***not a means of eliminating causes of action or substantive allegations***.[13] They are disfavored because striking a portion of a pleading is a drastic remedy.[14]

First, Plaintiff's alternative Motion to Strike should be denied because Plaintiff has not and cannot articulate any grounds why the presence of the defenses pled by the various defendants are prejudicial to it as required by Louisiana law. This alone is grounds for denying the alternative relief sought by Plaintiff in its Motion to Strike.

Second, Plaintiff is not entitled to the drastic relief which it seeks because it also has failed to show that the defenses made subject of its motion "are so unrelated to a plaintiff's claims as to be unworthy of any consideration." Quite the contrary, the defenses made subject of the Plaintiff's Motion are directly related to the Plaintiff's claims as detailed throughout the litany of Oppositions filed by the multiple defendants and as to be resolved ultimately by the Court. At a bare minimum, regardless of how the Court rules on the merits of the defenses – whether now or at trial – the defendants are entitled to leave the defenses in their Answer. There has been no showing by the Plaintiff that the defenses made subject of the lawsuit were "so unrelated to a plaintiff's claims as to be unworthy of any consideration."

III. SUMMARY JUDGMENT IS PREMATURE

A. Summary Judgment is Premature Because Insufficient Discovery Has Occurred

Through its Motion, Plaintiff seeks to have defenses asserted by the defendants premised on "regulator or receiver actions" dismissed by way of summary judgment. However, La. Code Civ. Proc. art. 966 provides that only "after adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the move is entitled to judgment as a matter of law shall be granted." That is not the situation before the Court.

As this Court is well aware, discovery in this matter is in its infancy and insufficient discovery to ascertain and evaluate the role any party or non-party had in the alleged failure of the LAHC has occurred. Whether any "receiver or regulator" actions or inactions were a cause-

[12] *Cole, supra*, at 544.

[13] *Id.*

[14] *Id.*

in-fact in LAHC's ultimate failure is a question the defendants have only begun to explore now that the prior stay has been lifted. The defendants are entitled to explore in discovery what, if any, responsibility the "receiver or regulator's actions" bore to the entirety of the alleged losses sustained by LAHC. Not until that is concluded would the present summary judgment motion be appropriate.

Plaintiff tries to avoid this result by arguing that the question before the Court is whether or not a legal duty exists. But that is a red herring. In reality, the Plaintiff seeks a ruling that it may be statutorily immune. Regardless of whatever immunity Plaintiff may or may not enjoy, the defendants are still entitled to put the receiver and/or the regulator on the jury form – further establishing why they are entitled to additional discovery before summary judgment may be ruled upon.

B. The Defendants Are Entitled to Discovery Prior to the Summary Judgment As Evidenced By the Fact that the Defendants Are Permitted to Place Non-Parties and Immune Parties on the Verdict Form

The Louisiana Supreme Court has rendered several opinions regarding quantification of the fault of non-parties and persons immune by statute, both before and after the 1996 change in law. In *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 94-1496 (La. 6/13/95), 657 So. 2d 975, the Supreme Court held that the Louisiana Legislature had not specified which parties should have their fault quantified as directed in La. Code Civ. Proc. art. 1812 ("Article 1812") prior to the 1996 amendment to La. Civ. Code. art. 2323 ("Article 2323").[15] The Supreme Court further held that the quantification of fault of a non-party was only appropriate when one tortfeasor has settled with and obtained a release from the tort victim, and when the non-party is a person whose negligence may be imputed to the plaintiff or a defendant.[16]

However, in 1996, the Louisiana Legislature amended Article 2323 to read, in pertinent part, as follows:

> A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a non-party, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall

[15] *Cavalier*, 657 So. 2d at 980-81.

[16] *Cavalier*, 657 So. 2d at 982.

> be reduced in proportion to the degree of percentage of negligence attributable to the person suffering injury, death, or loss.
>
> B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

This amendment was promulgated by the Louisiana Legislature in its 1996 extraordinary legislative session and became law on April 16, 1996.[17] Paragraph B of Article 2323 expressly states that the article applies to any claim for recovery of damages for injury, death or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability. Thus, by its own terms, the amended version of Article 2323, mandating that evidence of the fault of all responsible persons or entities be presented at trial, applies to any claim for damages, regardless of whether the claim arises under the law of virile share or comparative fault liability. Clearly, by inserting the phrase "any law or legal doctrine or theory of liability, regardless of the basis of liability," the Louisiana Legislature is presumed to have intended the Act's application to cases governed by both virile share and comparative fault liability.

In *Keith v. United States Fidelity & Guar. Co.*, 96-2075 (La. 5/9/97), 694 So. 2d 180, the Louisiana Supreme Court held that the clear pronouncement of the Legislature in Article 2323 invalidated the holding in *Cavalier, supra,* as to the quantification of fault of non-parties. The Supreme Court found that the amendment to Article 2323 was procedural in nature, and is to be applied retroactively. The Supreme Court further found that the retroactive applicability of Article 2323 was consistent with Article 1812, as amended in 1996, wherein the Louisiana Legislature clearly mandated that the fault of all parties and non-parties be placed on the jury verdict form.

Louisiana Code of Civil Procedure art. 1812 provides:

> A. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event, the court may submit to the jury written questions susceptible of categorical or other brief answer, or may submit written forms of the several special findings which might properly be made under the pleadings and evidence, or may use any other appropriate method of submitting the issues and requiring the written findings thereon. The court shall give to the jury such explanation and instruction concerning the matter submitted as may be necessary to enable the jury to make its findings upon each issue. If the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue omitted unless, before the jury retires, he demands its submission to the jury. As to an issue omitted without such

[17] 1996 La. Acts No. 3..

demand the court may make a finding, or if it fails to do so, it shall be presumed to have made a finding in accord with the judgment on the special verdict.

B. The court shall inform the parties within a reasonable time prior to their argument to the jury of the special verdict form and instructions it intends to submit to the jury and the parties shall be given a reasonable opportunity to make objections.

C. In cases to recover damages for injury, death, or loss, the court at the request of any party shall submit to the jury special written questions inquiring as to:

(1) Whether a party from whom damages are claimed, or the person for whom such party is legally responsible, was at fault, and, if so:

(a) Whether such fault was a legal cause of the damages, and, if so:

(b) The degree of such fault, expressed in percentage.

(2) (a) If appropriate under the facts adduced at trial, whether another party or nonparty, other than the person suffering injury, death, or loss, was at fault, and, if so:

(i) Whether such fault was a legal cause of the damages, and, if so:
(ii) The degree of such fault, expressed in percentage

(2)(b) For purposes of this Paragraph, nonparty means a person alleged by any party to be at fault, including but not limited to:

(i) A person who has obtained a release from liability from the person suffering injury, death, or loss.
(ii) A person who exists but whose identity is unknown.
(iii) A person who may be immune from suit because of immunity granted by statute.

(3) If appropriate, whether there was negligence attributable to any party claiming damages, and, if so:

(a) Whether such negligence was a legal cause of the damages, and, if so:
(b) The degree of such negligence, expressed in percentage.

(4) The total amount of special damages and the total amount of general damages sustained as a result of the injury, death, or loss, expressed in dollars, and, if appropriate, the total amount of exemplary damages to be awarded.

D. The court shall then enter judgment in conformity with the jury's answers to these special questions and according to applicable law.

La. Code Civ. Proc. art. 1812.

It is clear that Article 2323 and Article 1812 require that all parties and non-parties be listed on the jury verdict form and also mandate that the trial court must then enter judgment in

conformity with the jury's answers and the applicable law, including virile share apportionment law. This proposition is further supported by the Supreme Court's statement that:

> With this clear pronouncement from the Legislature on the heels of *Cavalier*, it is clear the holdings in *Cavalier* are no longer applicable as to the quantification of fault of all persons causing or contributing to the injury, death, or loss ... regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. We must now decide whether this legislative enactment is applicable retroactively or prospectively.

Keith v. United States Fidelity & Guaranty Company, 694 So. 2d at 182. Continuing, the Supreme Court stated:

> After carefully considering Act 3, we find that the legislative amendment of LSA-C. C. art. 2323 was **procedural legislation.**

Id. at 184 (emphasis provided).

Because the amendments to Article 2323 affect the procedure for apportioning fault and determining liability at trial, the amendments are procedural and must be applied retroactively.[18] Moreover, because the amendments were passed directly following *Cavalier supra,* they are remedial, as they constitute a curative act which remove past disabilities in order to affect the true intent of the legislature.[19] As a remedial statute, the amendments must be given retroactive application.[20]. The same reasoning would apply if the amendments are deemed to be interpretive legislation.[21]. However, the Louisiana Supreme Court specifically found that Article 2323 was

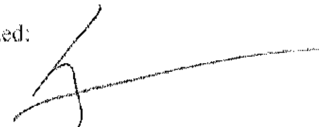
allocated to immune parties. Defendants should proceed and the summary judgment should be denied.

IV. ASSUMING *ARGUEDNO* PLAINTIFF'S MOTION IS TO BE GRANTED, THE RELIEF AWARDED BY LIMITED TO THAT WHICH WAS PRAYED FOR

Atlantic asserted sixty-three (63) specifically enumerated defenses in its Answer. With respect to Atlantic, Plaintiff's Motion pertains to only six (6) of those defenses. More specifically, as prayed for in its Motion and with respect to its Motion, Plaintiff requests the Court dismiss or strike Atlantic's: (1) defenses that Plaintiff characterized as being premised on Comparative Fault which it identified as Atlantic's Thirty-Third Defense (to the extent that this includes regulator or receiver actions), Thirty-Fourth Defense, Thirty-Sixth Defense (to the extent that this includes regulator or receiver actions), Forty-Eighth Defense (to the extent that this includes regulator or receiver actions); Forty-Ninth Defense (to the extent that this includes regulator or receiver actions), and Fifty-First Defense (to the extent that this includes regulator or receiver actions); (2) defenses that Plaintiff characterized as a Failure to Mitigate Damages which it identified as Atlantic's Thirty-Fifth Defense; and (3) defenses that Plaintiff characterized as an adoption of other party defenses which it identified as Atlantic's Sixty-Third Defense (to the extent that this includes regulator or receiver actions). Plaintiff also requested in its prayer that neither the Commissioner nor the Receiver, nor any of its representatives, be listed on the jury verdict form for allocation of fault.

As seen from the defenses asserted by Atlantic and on which Plaintiff seeks to have summary judgment entered in its favor, Plaintiff has laser-focused, in whole or in part, only those defenses calling into question the receiver or regulator's actions and/or failure to mitigate. To the extent the Court grants, in whole or in part, any part of the Motion with respect to Atlantic, Atlantic avers that the ruling should be no broader than the relief which the Plaintiff prayed for in its Motion. For those defenses which Plaintiff limited its Motion only "to the extent that this include regulator or receiver actions" or similar language, the application of the defense to issues beyond that limiting language are not before the Court and cannot be ruled upon.

Respectfully Submitted:



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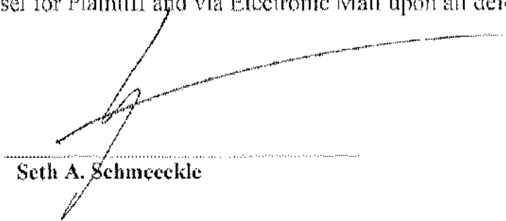
CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2020, a copy of Atlantic Specialty Insurance Company's Opposition Memorandum in Response to Plaintiff's Motion for Partial Summary Judgment Regarding "Regulator" Fault or "Receiver Fault" Defenses or, in the Alternative, Motion to Strike Defenses Precluded as a Matter of Law has been served via Facsimile and Electronic Mail upon counsel for Plaintiff and via Electronic Mail upon all defense counsel to this litigation.



Seth A. Schmeeckle